SUPREME COURT, U. S.
JAN 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-992

FRANK L. RIZZO, MAYOR OF THE CITY OF PHILADELPHIA, et al., POLICE COMMISSIONER JOSEPH F. O'NEILL, et al., *Petitioners*

v.

STEVEN G. FARBER, et al., *Respondents*

Reply Brief In Answer To Respondent's Brief In Opposition

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

ARGUMENT

Petitioners respectfully submit this Reply Brief to this Honorable Court for the purpose of responding to several erroneous factual and legal assertions conveyed to this Court by respondents in their brief. Respondents' brief can best be characterized as a weak attempt at concealing the substantive issues presented herein; while, concurrently, seeking to suppress the constitutional rights of petitioners.

Initially, it must be pointed out that, as a matter of law, respondents' position is untenable. On page 4 of their brief, respondents make the following statement:

> Contemnor-petitioners concede, as they must, that no civil contempt sanctions have as yet been imposed. (Petition, at 7,A. 19-20). For this reason, even assuming *arguendo* their alleged 'non-party' status, their appeals were premature. *Fireman's Fund Ins. Co. v. Myers*, 439 F.2d 834, 838-9 (3rd Cir. 1971); *S.E.C. v. Naftalin, supra.*

Contrary to respondents' assertions, neither of the cited cases is controlling in the issues at bar. While these cases may well stand for the general proposition that as to named parties, an interlocutory contempt order is not appealable; they have no vitality in determining the appealability of such an order directed against a non-party since, *inter alia*, they never discussed the issue.

Respondents attempt to create an inference that petitioners are named party defendants to the contempt litigation. On pages 3 and 4 of their brief, respondents make the following statements:

> Petitioners contend that their non-party status arises from respondents failure to amend the pleadings once petitioners' actual identities became known. (Petition at 8). While petitioners do not indicate whether the

'pleading' referred to is the civil complaint as opposed to the petition for civil contempt, their argument, in either case, is factually incorrect. As to the civil contempt petition, their trial counsel stipulated to the actual identity of each 'John Doe' contemnor and expressly agreed that their actual names be made a matter of record. (See Transcript 411-413 and stipulation attached hereto at Appendix, A1). This stipulation was entered into *prior* to defense testimony at the contempt hearing, and each petitioner was clearly on notice at that time as to their status both as putative contemnors and as civil defendants; and, more importantly, as parties entitled to appeal *after* a final order and decree in the underlying civil suit. Moreover, respondents filed a motion to amend the civil complaint by substituting the actual names for the 'John Doe's appellations of the original civil complaint. This motion, which would merely conform the civil complaint to the stipulation agreed to by petitioners' counsel, is currently pending in the trial court.

Reduced to its simplest terms, respondents argue that a contorted trial stipulation can form a constitutionally acceptable substitute for procedural due process. They also suggest that an amendment to their pleadings, moved for after the appeal was taken, can cure this defect.

It is submitted that neither of these arguments form a valid basis for denying this Petition. However, both arguments will be separately repudiated.

Respondents seek to distort a trial stipulation regarding the identity of various police officers into an explicit agreement to make petitioners party defendants. It is submitted that the stipulation speaks for itself and that common usage of the English language makes clear that the interpretation attempted to be ascribed to by respondents cannot be drawn, even by connotation, from the words of the stipulation.[1]

1. See Appendix for relevant pages of notes of testimony.

To the contrary, it can be shown that respondents' interpretation of the stipulation was never envisioned by either the parties or the District Court. For the stipulation to have the effect that respondents assert, and in order to comply with notice requirements of procedural due process, a waiver of service is required. There is no such waiver here.

Respondents subsequent acts, to wit; their motion to amend the pleadings to include petitioners, emphasizes the inconsistency of their present construction of the stipulation. Thus, the necessity for such an amendment to join petitioners as party defendants would have been obviated. Furthermore, even assuming that respondents correctly interpret the stipulation, petitioner O'Donnell is still not a party since he was neither identified in respondents' pleadings nor in the stipulation.

This leads to the inevitable conclusion that their argument is nothing more than an attempt to conceal or confuse the actual facts in this proceeding.

Moreover, the matter of respondents' proposed post-trial and post-appeal amendment to the complaint is not before this Court, and has been improperly raised by respondents. This is an appeal from the Third Circuit Court's order of September 26, 1973. Respondents' proposed amendment was not filed until October 18, 1973,[2] after the Third Circuit improperly dismissed the appeal.

Finally, respondents argue that issues relating to "John Doe" pleading were not adjudicated below and, hence, are not proper issues before this Court. To the contrary, these issues came to the forefront when the District Court held the petitioners in contempt of court, on the basis of the "John Doe" pleading, notwithstanding their never being served with process or being made parties to the action. As such, the question of the propriety of this form of pleading, as well as the validity of the pleadings themselves, was presented to the Third Circuit. Thus, respondents' contention that the issue is not properly before this Court is without merit.

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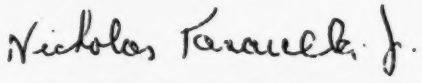
2. See Appendix for relevant docket entries.

CONCLUSION

In view of the foregoing, respondents' brief cannot form the basis for a denial of a writ of certiorari to review the judgment and order of the Third Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JOHN MATTIONI, Deputy City Solicitor, do hereby certify that three copies of the Petitioners' Reply to Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were served on Jack J. Levine, Esquire, attorney for respondents, by hand, on January 31, 1974.

JOHN MATTIONI
Deputy City Solicitor

RELEVANT DOCKET ENTRIES

1973

June 22	Opinion Huyett, J. re: findings in contempt as to Lt. Fencl et al, plffs shall submit a proposed order in conformance with the memorandum within (10) days, filed 6/22/73 entered and copies mailed.
June 29	Order AMENDING Opinion and Order of 6/22/73, filed. 7/3/73 entered and copies mailed.
June 29	Order that Police Com. Joseph O'Neill & Inspector George Fencl are in contempt of court for violating Temporary Restraining Order, with respect to Plffs. Miles Day, et al; etc., filed 7/3/73 entered and copies mailed.
Jul. 16	Dfts, notice of appeal, filed.
Jul. 16	Copy of Clerk's notice to U. S. Court of Appeals, filed.
Aug. 3	Original record transmitted to the U. S. Court of Appeals. (#72-2052)
Sept. 26	Certified copy of Order of 9/26/73 from the U.S.C.A. that Motion by Steven G. Farber, et al, to quash appeal with memorandum in support thereof, and appellants' answer to motion to quash appeal and memorandum in opposition to motion to quash appeal,—the foregoing motion is GRANTED, filed.
Oct. 18	Plff's motion to allow amendments to complaint, brief in support thereof, certificate of service, filed.
Oct. 18	Dfts. answer to motion to allow amendments to complaint, filed.

Excerpts of Hearing of December 6, 1972

* * *

MR. GOLDMAN: We would agree to that, except for the characterization of an arrest. I think that's a matter for the Court. They were taken into custody.

THE COURT: Other than the technical use of that word. They were taken into custody and so held and all the rest of it is agreeable to the City, is that correct?

MR. GOLDMAN: That is correct.

THE COURT: I will approve the stipulation.

MR. GOLDMAN: Thank you, sir.

MR. RUDOVSKY: Two other matters. I have requested Mr. Goldman and he has agreed—

MR. GOLDMAN: Mr. Farber was released at 9:30.

MR. RUDOVSKY: Certainly.

MR. GOLDMAN: All right.

MR. RUDOVSKY: Mr. Goldman has indicated to us that he will provide us with names of the police officers who our witnesses have identified by badge numbers and they become available to him. We would ask leave of the Court although we are requesting to enter the names of those persons into the record when they become available.

THE COURT: Any objection, Mr. Goldman?

MR. GOLDMAN: No, sir.

THE COURT: How will you do that?

MR. RUDOVSKY: The best thing to do would be a stipulation, perhaps by letter, to the Court to be made part of the record and we just suggest that we list the numbers

of the police officers that the witnesses have testified to and put their names next to them.

THE COURT: By stipulation of counsel, very well, that is—

MR. RUDOVSKY: I would also request that any other officers who have been described by description who were not named or identified be made available to us, if they become available to Mr. Goldman.

MR. GOLDMAN: The descriptions that were received are so vague that I can't promise to assist in that matter.

THE COURT: If you learn who those officers are, would you then advise the plaintiffs?

MR. GOLDMAN: Yes.

THE COURT: Assuming you obtain that information.

MR. GOLDMAN: Yes, sir.

THE COURT: And that may be made part of the record by stipulation, also.

MR. RUDOVSKY: The final matter concerns Lt. Rich. I spoke to Mr. Goldman and indicated we would want to call him as our next witness. Apparently he is out of the City and would be there until January 1st. We are willing to rest and we would ask leave of the Court for permission to open our case later if we determine we need his testimony either during or after the defendant presentation.

THE COURT: Any objection?

MR. GOLDMAN: No.

THE COURT: That is in that event, the plaintiff 's rest their case.

THE COURT: Would you proceed, Mr. Goldman.

MR. GOLDMAN: The first witness will be Captain Lindsay, previously sworn.

THE COURT: Would you give your name?

THE WITNESS: Captain William Lindsay, number 66.